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No. 87-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PENERS L. GRIFFIN, *et al.*,

Petitioners,

v.

RICHARD L. DUGGER, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that a layman, filing an administrative charge with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et. seq., is required to satisfy the requirements of Article III standing, in order to have that charge investigated and processed by the Equal Employment Opportunity Commission.

2. Whether the Court of Appeals erred in holding that a black employee does not have standing to file an administrative charge with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et. seq., complaining that the employer discriminates against black applicants for

employment on the basis of race, where the discrimination against applicants artificially lowers the number of black persons in the workforce, and deprives the employee of a nondiscriminatory work environment.

3. Whether the Court of Appeals erred in holding that a black employee does not have standing to litigate, in federal court, a claim filed under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et. seq., complaining that the employer discriminates against black applicants for employment on the basis of race where the discrimination against applicants artificially lowers the number of black persons in the workforce, and deprives the employee of a nondiscriminatory work environment.

4. Whether the Court of Appeals, violated the principles of Crown, Cork & Seal v. Parker, 462 U.S. 345 (1983), United Airlines v. McDonald, 432 U.S. 538 (1974) and Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982), by its failure to hold that the commencement and certification of a class action tolled the filing requirements of Title VII for putative class members.

PARTIES

The parties to this proceeding are Peners L. Griffin, Henry Dejerinett, Alvin Smith, John Butler, Raymond W. Gearey, Louie L. Wainwright, Richard L. Duggger, the State of Florida, the Florida Department of Corrections, and a class composed of all past, present, and potential black employees of the State of Florida Department of Corrections.

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PENERS L. GRIFFIN, et al.,

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Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Petitioners, Peners L. Griffin, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered on August 7, 1987, rehearing denied October 30, 1987. The opinion of the court of appeals is reported at 823 F.2d 1476 (1987) and is set out in the separate

Appendix at pages 1a to 85a. The Order of the district court certifying the class, entered March 12, 1981, is set out in the Appendix at pages 86a to 94a. The Order of the district court allowing intervention and reaffirming class certification, entered July 30, 1982 is set out in the Appendix at pages 95a to 110a. The district court's Memorandum Opinion, of August 25, 1983 is unreported, and set out in the Appendix at pages 111a to 188a.

Jurisdiction

The judgment of the court of appeals was entered on August 7, 1987. A timely petition for rehearing was filed on September 28, 1987, and the order of the court of appeals denying the petition for rehearing and the suggestion for rehearing en banc was entered on October 30, 1987.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutory Provision Involved

(See Appendix page 189a)

Statement of the Case

This is an action brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. Petitioner, Peners L. Griffin, the plaintiff below, was at all times relevant to these proceedings an employee of the Florida Department of Corrections (FDOC). This action was commenced in 1979, as a class action, charging the defendants with maintaining racially discriminatory policies with respect to recruitment, hiring, assignment, promotion and discipline; with maintaining a racially biased working environment; and with

utilizing an unlawful written entrance examination.

The parties submitted a stipulation which, together with the record, established the factual predicate for the court's March 12, 1981 order certifying a class of "all past, present and potential black employees of the State of Florida Department of Corrections". (Appendix 86a)

Following this Court's decision in General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147 (1982), plaintiffs and Alvin Smith filed a motion to intervene class member Smith, who had failed the Correctional Officer I (COI) examination after the class was certified. The district court permitted Smith to intervene and to represent class members who had failed the discriminatory examination.

In 1982, the district court held, on Motion for Summary Judgment, that the entry-level examination for correctional officers was unlawful because it had a racially disparate impact and, as admitted by the FDOC, was not validated. Following trial on the remaining issues, notice was given to class members affected by the test in order to begin stage two relief proceedings. More than 1400 persons filed claims as a result of the notice.

Pursuant to § 1292(b), FDOC took an interlocutory appeal of the district court's order certifying the class. In August 1987, a divided panel of the Eleventh Circuit vacated the class certification order, holding that none of the three named plaintiffs could properly represent a class of individuals who had failed the Correctional Officer I examination.

The Eleventh Circuit declared the class certification improper, holding that while the intervening applicant who failed the examination had standing to assert the claim, he should not have been allowed to intervene on the basis of the incumbent employee's EEOC charge.

Although the court acknowledged the general rule that an individual who did not file an EEOC charge may sue so long as a timely charge was filed encompassing the claims he seeks to litigate, it found that this "single-filing" rule did not justify allowing the intervening applicant to intervene.

As noted by Judge Hatchett in dissent,

> [T]he majority has grafted the constitutional standing requirement for parties litigating in federal district court onto the filing requirements for persons alleging Title VII claims before

> the EEOC. Such a requirement does not, and never has existed.

Griffin v. Dugger, 823 F.2d at 1494.

In so holding the panel effectively limits the scope of an individual's standing to file an EEOC charge so as to prevent a charging party from challenging discrimination that affects him or her as a result of an employer's maintenance of a discriminatory working environment.

A timely petition for rehearing and suggestion for rehearing en banc were filed.[1] The petition and suggestion were denied by order of the court on October 30, 1987.

Statement of the Facts

The Florida Department of Corrections (FDOC) operates the state correctional

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[1] The Equal Employment Opportunity Commission filed an amicus brief in support of the petition for rehearing and suggestion for rehearing en banc.

system, and at the time of trial employed approximately 8,600 persons. More than half of these employees are assigned to the protective service job category. The entry-level position in that career ladder is Correctional Officer I (COI).

In April 1971, Petitioner Peners L. Griffin became the first black Road Prison Officer at the Tallahassee Road Prison, operated by the Florida Department of Corrections. When Griffin's 1975 charge was filed, there were no blacks at all in the ranks of the 41 superintendents, assistant superintendents, and personnel managers, and only one of the 19 correctional chiefs was black. Pl.Ex.D-8. Of the 129 lieutenants (Correctional Officer III and Correctional Shift Supervisor), only seven were black. Pl.Ex.d-6a, Table 2. Given the subjective nature of the decision making used in

determining promotion and other employment related matters, the FDOC's artificial limiting of the number of black employees hired, directly influenced Griffin's ability to be promoted, his exposure to discipline, and the quality of his professional experience.

The district court's substantive determination, that the FDOC's use of the Correctional Officer I written examination violated Title VII, is not in issue. The district court analyzed the impact of the test using both the four/fifths rule of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §1607.4(D), and a calculation of the standard deviation with respect to black/white pass-fail rates, cited by this Court in Castenda v. Partida, 430 U.S. 482, 496 n.17 (1977). Under both these methods, the district court found that

plaintiffs had established the disparate impact of the correctional officer examination, and that the defendant had failed to provide a justification for its use.

In 1975, following two terminations which were overturned when administratively challenged, Mr. Griffin filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), in "which he alleged discrimination by the FDOC against blacks in discipline, hiring, promotions, and other employment practices."[2]

After requesting a right-to-sue letter, Mr. Griffin timely filed a complaint in this action on October 15, 1979. The complaint, filed on behalf of himself and others similarly situated,

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[2] Memorandum Opinion, August 25, 1983, Appendix 111a, 114a.

specifically challenged as discriminatory the defendants' policies and practices related to recruitment, hiring, assignment, promotion, and discipline; the maintenance of a racially biased working environment; and, the utilization of written entry level examinations which have a discriminatory impact on members of the class.

On June 17, 1980 Henry L. Dejerinett was added as a party-plaintiff. And on March 12, 1982 the district court certified the case as a class action with Messrs. Griffin and Dejerinett representing a class of "all past, present, and potential black employees of the State of Florida Department of Corrections".

Following the decision of this Court in General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147 (1982), plaintiffs

filed a motion to intervene Alvin Smith,[3] who failed the exam while he was a member of the certified class, as an additional named plaintiff to represent those in the class who had applied for the position of correctional officer, failed the written entry-level examination, and not been hired. The defendants filed a motion to vacate the class certification order.

On July 28, 1982, the district court denied the defendants' motion to decertify the class, and permitted Smith to intervene, noting that as an unsuccessful applicant Smith had an interest in the suit, which sought, inter alia, to challenge the defendants' hiring practices.

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[3] In July 1982, Intervenor Smith also filed a charge with the EEOC challenging the discriminatory impact of the correctional officer examination on black applicants for employment.

The district court rejected the defendants' contention that Smith could not be a class representative because he had not filed a timely charge with the EEOC. Rather, the district court held that the charges of discrimination filed by Griffin included the hiring claim, in addition to promotion, job classification, discipline, and termination claims. Relying on the Fifth Circuit's single-filing rule, as articulated in Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968), the district court held that Smith was not required to satisfy additional administrative prerequisites.[4]

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[4] The single-filing rule provides that where one plaintiff has filed a valid EEOC charge, individuals with claims arising out of similar discriminatory treatment in the same time frame may proceed in court without satisfying the filing requirement. "It would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC". Oatis v. Crown Zellerbach

See also, Albemarle Paper Co. v. Moody, 422 U.S. 405, 414, n.8 (1975).

Applying reasoning similar to that used by this Court in Crown, Cork & Seal v. Parker, 462 U.S. 345 (1983), the district court upheld Smith's motion to intervene, finding that while Falcon was decided on June 14, 1982, plaintiffs' filed their motion to intervene on July 8, 1982.

> This court finds that defendants will not suffer prejudice if Smith is allowed to intervene. Defendants have been on notice since the institution of this action that they must defend against hiring claims. The parties have conducted discovery regarding the hiring issue, and have vigorously litigated this claim as evidenced by the motion for partial summary judgment.

Corp., 398 F.2d 496, 498 (5th Cir. 1968). The rule "presupposes, of course, that the subsequent claims are sufficiently similar to the original complaint and the employer received adequate notice and an opportunity for conciliation". Snell v. Suffolk County, 782 F.2d 1094, 1100 (2nd Cir. 1986).

Order, July 30, 1982, App. 108.

Reasons For Granting The Writ

INTRODUCTION

The court of appeals judgment is based principally on its application of Falcon, not to questions related to Rule 23, Federal Rules of Civil Procedure, but to the constitutional requirements for standing and the statutory requirements for filing an EEOC charge. In so doing, as noted by Judge Hatchett in dissent, the court failed to distinguish between the policy underlying the constitutional standing requirement, and the purpose and effect of an administrative agency's conciliation process.

On appeal, the defendants did not deny that they violated Title VII to the detriment of thousands of black applicants. Rather, they sought and

obtained from the court of appeals a procedural bar which deprives individual class members of their entitlement to relief.

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' DECISION CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL ESTABLISHING STANDING TO FILE A CHARGE BEFORE THE EEOC, AND WITH THE STATUTORY PURPOSE OF TITLE VII

The central issue posed by this case is whether the single-filing rule permits applicant Smith to proceed pursuant to employee Griffin's 1975 charge complaining of hiring discrimination. In addressing that question, the Eleventh Circuit focused on whether Griffin was a proper party under Rule 23, Federal Rules of Civil Procedure, and Falcon, to represent a class of failed applicants in federal court, rather than whether Griffin could properly charge the FDOC with hiring

discrimination before the EEOC, pursuant to §706 of Title VII. Plainly, under clear prior precedent in the Fifth Circuit and elsewhere, Griffin could claim personal injury as a result of FDOC's hiring practices through the loss of benefits arising from association with black co-workers in a working environment unaffected by discrimination.[5]

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[5] As argued by petitioners below, that injury could fairly be traced to a correctional officer examination which eliminated potential black colleagues at a rate six times that of white applicants, and therefore was obviously detrimental to the work environment and tended to segregate it. Compare Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 260-64 (1977) (Citing United States v. SCRAP, 412 U.S. 669, 688 (1973), where the Court held that the injury may be indirect, though the complaint must indicate that the injury is indeed fairly traceable to the defendant's acts or omissions.) In Arlington Heights, the Court found such an injury traceable between a municipality's discriminatory zoning decision and injury to a developer who had contracted to build a low-income housing project, and also to a prospective minority tenant who sought such housing in the village.

The Eleventh Circuit's decision in this case is in direct conflict with the decision of the Seventh Circuit in Steward V. Hannon, 675 F.2d 846 (1982). There, in an action challenging the use of an assistant principal examination given by the Chicago Public School System because it was racially discriminatory, the only plaintiff to have received an EEOC right-to-sue letter was a white teacher. The court of appeals concluded that Congress intended to define Title VII standing as broadly as the Constitution permitted. Since the white plaintiff alleged in her complaint that she was forced to work in an environment permeated with racial discrimination, she stated a cognizable claim under Title VII. Similarly, Griffin's complaint alleged that FDOC maintained a racially biased working environment.

In Waters v. Heublein, Inc. 547 F.2d 466, 469 (9th Cir. 1976), cert. denied, 433 U.S. 915 (1977),(white woman had standing to sue to enjoin employment discrimination directed at blacks and Hispanic-Americans), EEOC v. Mississippi College, 626 F.2d 477, 482 (5th Cir. 1980), cert denied, 453 U.S. 912 (1981), (white employee allowed to charge her employer with discriminating against blacks on the basis of race in recruitment and hiring in violation of Title VII), cert. denied, 435 U.S. 915 (1978), and EEOC v. Bailey Co., 563 F.2d 439, 451-54 (6th Cir. 1977), (definition of a person claiming to be aggrieved under Title VII includes a white person, here a white employee, who may have suffered from the loss of benefits from the lack of association with racial minorities at work), the Ninth, Fifth and Sixth Circuits

relied on this Court's decision in Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972) to hold that a white plaintiff had standing to challenge discrimination against nonwhite groups.

Section 706(b) of Title VII provides that a charge of discrimination may be "filed by or on behalf of a person claiming to be aggrieved. . ." 42 U.S.C. §2000e-5(b). In determining that Mr. Griffin could not file a charge either on behalf of other blacks suffering from hiring discrimination, or on behalf of himself challenging the discriminatory environment in which he was forced to work, the Eleventh Circuit gave an impermissible reading of the Article III standing requirements as applied to the filing of an administrative charge under Title VII.

The Equal Employment Opportunity Commission has consistently taken the position that all applicants and employees have a right under Title VII to a discrimination-free working environment, as a term or condition of their employment.

> The Commission interprets Section 706(a) of Title VII of the Civil Rights Act of 1964, to mean that any employee has standing to file a charge of employment discrimination alleging the commission of any unlawful employment practice by his employer, because it constitutes a term or condition of employment for all employees. Although the charging party is not a member of the class against which the allegedly unlawful employment practices are directly committed, we believe it clear that an employee's legitimate interest in the terms and conditions of his employment comprehends his right to work in an atmosphere free of unlawful employment practices and their consequences.

Dec. No. 70-09 (1969), 1973 EEOC DEC. [CCH] ¶ 6026 p. 4049. See also Dec. No.

72-0591 (1971), id. at ¶ 6314 p. 4562, 4564; Dec. No. 71-969 (1970), id. at ¶ 6193 p. 4328, 4329. Brief Of Amicus Curiae Equal Employment Opportunity Commission in Support of Petition For Panel Rehearing and Suggestion of In Banc Consideration at 9-10. See also, Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982).

Consistent with this broad interpretation of the right of individuals to initiate Title VII administrative proceedings, Congress amended Title VII in 1972 to allow persons, agencies, and organizations that may have no relationship with the party charged, to file an EEOC charge on behalf of an aggrieved party.[6] Such a charge need not name the person on whose behalf it is

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[6] See, Cong. Rec. (H 1862), March 8, 1972.

made, and the aggrieved party may request that his or her identity remain confidential, although the party filing the charge must provide the EEOC with the name, address and telephone number of the aggrieved person.

As noted by this Court in EEOC v. Shell Oil Co. 466 U.S. 54, 68 (1984), "a charge of discrimination is not the equivalent of a complaint initiating a lawsuit". Rather, the purpose of the charge is to place the EEOC on notice that "someone . . . believes that an employer has violated the Title [VII]" id., and "to give prompt notice to the employer" Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 398 (1982). Additionally, "Congress not only authorized but requires the Commission [EEOC] to investigate charges of discrimination", EEOC v. Children's Hospital, 719 F.2d 1426, 1428 (9th Cir.

1983), see also, 42 U.S.C. § 2000e-5(b), and conciliation, through the administrative process, is the favored route to resolution of Title VII claims. Foster v. Gueory, 655 F.2d 1319, 1321-23 (D.C. Cir. 1981); Snell v. Suffolk County, 782 F.2d 1094, 1100 (2d Cir. 1986).

Given the differences between the policy underlining the Article III cases or controversies standing requirements, and the conciliatory purposes of the policy underlining the statutory scheme of Title VII, there is little to suggest that the scope of a charge before an administrative body, such as the EEOC, must conform to the dictates of the most narrow reading of Article III standing.

> To no small degree administrative agencies for the enforcement of public rights were established by Congress because more flexible and less traditional procedures were called for than those evolved by the courts.

FCC v. Nat. Broadcasting Co., 319 U.S. 239, 248 (1943) (Frankfurter, J., dissenting):

The decision below destroys the flexibility embodied in the administrative process, to the detriment of the more than 1,400 claimants who relied upon it. While acknowledging that Griffin had raised a testing claim before the EEOC, the court rejected Smith's assertion of that claim because of its view that Griffin lacked the Article III standing necessary to raise the initial claim before the EEOC.

> Griffin never had constitutional standing to raise a testing or a hiring claim, a fundamental requirement underlying the single-filing rule: . . . Smith cannot point to Griffin's EEOC charge, which arguably contained a testing claim brought on behalf of others, to excuse his failure to have filed his own testing charge with the EEOC when Griffin did not have standing to raise the testing issue. We cannot permit the

> single-filing rule to be used to circumvent the constitutional requirement of standing.

Griffin v. Dugger, 823 F.2d at 1493.

The Eleventh Circuit's decision explicitly conflicts with the reasoning of the Fifth Circuit in Harris v. Amoco Production Co., 768 F.2d 669, 679 (5th Cir. 1985), wherein the court held that the characterization by this Court and others, of the relevant statutory provisions as procedural rather than jurisdictional, "denotes an issue not of Article III power but of legislative and judicial method".

The Eleventh Circuit does not make clear how its new procedural burden enhances the purpose of Congress or aids the EEOC conciliation process. Contrary to the constitutional requirement that federal courts hear only lawsuits

involving "cases or controversy",[7] the EEOC conciliation process is not designed to be adversarial.[8] If the EEOC fails to bring about a settlement, the consequence may be a lawsuit, however the parties are not limited by the results of the EEOC's investigation, and the court is not bound by an EEOC finding of probable cause.

In Oatis v. Crown Zellerbach Corp., 398 F. 2d 496 (5th Cir. 1968), the Fifth Circuit established the fundamental

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[7] U.S. Constitution Art. III, § 2

[8] As this Court has previously observed, the EEOC,

> is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion.

Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 365 (1977).

principle that a charge of discrimination, filed by a single plaintiff, adequately exhausts administrative remedies for the entire class. See, Albemarle Paper Co. v. Moody, 422 U.S. 405, 414, n.8 (1975).

Where, as here, the charge indisputably satisfies the statutory purposes of both notice and opportunity to settle, there is little purpose in also requiring that the charging party have a level of standing sufficient to satisfy the requirements of Rule 23 and Falcon.

Moreover, several circuits have adopted the single-filing rule unencumbered by the narrow standing requirement imposed by the Eleventh Circuit. Foster v. Gueory, 655 F.2d 1319 (D.C. Cir. 1981) (Where the two claims are so similar that it can fairly be said that no conciliatory purpose would be served by filing separate EEOC charges, then it

would be "wasteful if not vain,"... to require separate EEOC filings); Lilly v. Harris-Teeter Supermarket, 720 F.2d 326 (4th Cir 1983), cert. denied, 466 U.S. 951 (1984); Snell v. Suffolk County, 782 F.2d 1094, 1100-02 (2d Cir. 1986); Allen v. Amalgamated Transit Union, 554 F.2d 876, 882-83, n.9 (8th Cir. 1977), cert. denied, 434 U.S. 891 (1977); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969).

The Eleventh Circuit held that the first prong of the single-filing rule - that "at least one plaintiff must have timely filed an EEOC complaint that is not otherwise defective" Jackson v. Seaboard Coast Line Railroad Co., 678 F.2d 992, 1011-12 (11th Cir. 1982) - was met. However, the court erroneously held that the second prong of the rule - the similarity of the claims - was not

investigation of the correctional officer examination, and thus permitted the parties a first opportunity to settle the hiring grievance through the EEOC conciliation process.

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court held in its Order Certifying Class, March 12, 1981, App. 86a, 105a,

> [T]his suit has been litigated for years as a class which included applicants. See, e.g., Documents 54, 108, and 120. Extensive discovery has taken place on the hiring issue. See, e.g., Documents 37, 38, and 43. It would be greatly prejudicial, at this late date, to exclude potential employees from the class.

See also, Memorandum Opinion, August 25, 1983, App. 114a.

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S OPINION IN TRAFFICANTE V. METROPOLITAN LIFE INSURANCE CO., 409 U.S. 205 (1972), AND WITH THE DECISIONS OF OTHER COURTS OF APPEAL INTERPRETING THAT OPINION.

The issue presented by this case is not whether Griffin could properly represent, in federal court, class members who failed the Correctional Officer I examination. Plainly, under Falcon Griffin could not represent that sub-class. On the other hand, the law is equally clear that as an employee Griffin has a right to litigate, even before a federal court, his employer's maintenance of a discriminatory working environment, and to show the connection between the employer's hiring policies and the injury he suffers as a result of those policies.

The court of appeals' conclusion conflicts with this Court's decision in Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 210 (1972). In Trafficante, this Court held that the language of §810 of the Fair Housing Act, authorizing a "person aggrieved" to file suit under the Act, was intended by Congress to confer standing to the fullest extent permitted by Article III. The Court reasoned that since black and white tenants of an apartment complex, which allegedly discriminated against non-whites, alleged "injury in fact" in the form of the lost benefits of interracial association, they had standing to sue. See also Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979).

The reasoning applied by the Court in Trafficante has been consistently applied by the courts of appeal to allow broad

standing in Title VII cases. In EEOC v. Mississippi College, 626 F.2d 477, 481-84 (5th Cir. 1980), the Fifth Circuit held that a white woman had standing to charge her employer with race discrimination in hiring, noting that she was a "person claiming to be aggrieved," within the meaning of §706 of Title VII, 42 U.S.C. §2000e-5, because she "could claim that the discrimination deprived her of the benefits arising from association with racial minorities in a working environment unaffected by discrimination".

> [T]he strong similarities between the language, design, and purposes of Title VII and the Fair Housing Act require that the phrase 'a person claiming to be aggrieved' in Section 706 of Title VII must be construed in the same manner that Trafficante construed the term 'aggrieved person' in Section 810 of the Fair Housing Act.

Id. at 482.

The Eleventh Circuit's opinion conflicts with the holdings of other courts of appeals which have applied Trafficante in an identical fashion. EEOC v. Bailey Co., 563 F.2d 439, 450-54 (6th Cir. 1977), cert. denied, 435 U.S. 915 (1978) and Waters v. Heublein, 547 F.2d 466, 469-70 (9th Cir. 1976), cert. denied, 433 U.S. 915 (1977). See also Hackett v. McGuire Brothers, 445 F.2d. 442 (3rd Cir. 1971)[10] (Language of 42 U.S.C. §2000e-5 "shows congressional intention to define standing as broadly as permitted by Article III of the Constitution"); Gray v. Greyhound Lines, 545 F.2d 169, 173-75 (D.C. 1976) (Citing Sierra Club v. Morton, 405 U.S. 727, 734 (1972), for the proposition that "[I]njuries to intangible interests fulfill the constitutional

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[10] Cited with approval in Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 209 (1972).

requirements as well as do injuries to economic interests."); and Berkman v. City of New York, 626 F.Supp. 591, 593-94 (E.D.N.Y. 1985) (Female firefighters had standing to challenge entry exam since the result of discrimination in future hiring would leave them an insular minority of women who slipped through the department's screening practices.). See also, Rogers v. EEOC, 454 F.2d 234, 237-39 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972), cited with approval in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), (Hispanic complainant could raise a claim under Title VII by alleging that her employer created an offensive working environment for employees by giving discriminatory service to its Hispanic clientele.)

Trafficante and its progeny clearly stand for the proposition that in

interpreting §706 of Title VII, the broadest, not the most narrow, application of Article III standing applies. It follows that Griffin's assertion of injury as a result of the hiring policies of the defendant, and his complaint of his employer's maintenance of a discriminatory work environment, satisfies the standing requirements of Article III as set out by this Court and applied by the courts of appeal.

The impact of Falcon on this process is that in order to sustain a subsequent across-the-board class action in federal court, the original charging party must be joined at the litigation stage by an additional class representative who not only has broad Article III standing to litigate the general issue, but is specifically appropriate to represent absent class members who may have suffered

a more direct injury from the same policy.

III.

CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S OPINIONS IN CROWN, CORK & SEAL V. PARKER, 462 U.S. 345 (1983), ZIPES V. TRANS WORLD AIRLINES, INC. 455 U.S. 385 (1982) AND UNITED AIRLINES V. MCDONALD, 432 U.S. 385 (1977)

In failing to recognize intervenor Smith's status as an appropriate class representative, the Eleventh Circuit ignored a line of Supreme Court cases designed to protect the rights of putative and actual class members, as well as to protect the integrity and use of the class action device. American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), United Airlines v. McDonald, 432 U.S. 385 (1977), and Crown, Cork, & Seal Co. v. Parker, 462 U.S. 345 (1983).

In United Airlines v. McDonald, supra, 432 U.S. at 391-392, n.11, this Court held that the tolling principle of American Pipe & Construction Co. v. Utah, supra, applied to both limitations periods established by Title VII: the initial 180 day charge filing period; and the ninety day limitation for filing suit following the receipt of a right-to-sue letter. The Court held that the "critical fact" was that the intervenor acted "as soon as it became clear to [her] that the interests of the unnamed class members would no longer be protected by the named class representatives." 432 U.S. at 394.

In summarily asserting that Smith had not filed a timely charge with the EEOC,[11]

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[11] The court of appeals determination that Smith had not filed a timely charge was in effect De Novo fact finding, in that the district court did not reach the question of the application of the tolling principles explained in Crown Cork & Seal Co. v. Parker, 462 U.S.

the court of appeals failed even to address petitioners' arguments that Smith's charge was entitled to timely consideration on the basis of these holdings.

In Crown, Cork, & Seal Co. v. Parker, 462 U.S. 345 (1983), this Court held:

> We conclude, as did the Court in American Pipe, that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action. 414 U.S. at 554, 94 S.Ct. at 766. Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits

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345 (1983), and other cases, relying instead on the single-filing rule. The court of appeals, after holding that the single-filing rule was inapplicable here, inexplicably failed to address the question of equitable tolling, or to remand for further fact-finding by the district court. See, Griffin v. Dugger, n.8 Appendix 11a.

> or to intervene as plaintiffs in the pending action.

Id. at 353.

In the case at bar, as soon as it became likely, by virtue of this Court's holding in Falcon, that Griffin and Dejerinett might no longer be able to represent his interest, Smith filed a separate charge of discrimination with the EEOC and sought to intervene in the existing action.

At the time that Smith failed the Correctional Officer I examination, he was a member of the class, represented by Griffin and Dejerinett. It follows that since a class action had already been filed and certified, the 180 day period for filing a charge with the EEOC was tolled by virtue of the filing of Griffin's lawsuit. Therefore, it was not until after Falcon and there was a challenge to the certification that it

became necessary for Smith to move to protect his independent right to proceed against FDOC.

In Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 397 (1982), this Court specifically held that the Title VII "provision for filing charges with the EEOC should not be construed to erect a jurisdictional prerequisite to suit in the district court." Rather, the Court held that this provision was more in the nature of a "statute of limitation" subject to recognized equitable doctrines and not a restriction of jurisdiction. Accord, Gooding v. Warner-Lambert Co., 744 F.2d 354, 358 (3rd Cir. 1984); Perdue v. Roy Stone Transfer Corp., 690 F.2d 1091, 1093-95 (4th Cir. 1982); Sterns v. Consolidated Management, Inc., 747 F.2d 1105, 1110-11 (7th Cir. 1984); Vance v. Whirlpool Corp., 716 F.2d 1010, 1012 (4th Cir. 1983), cert.

denied 465 U.S. 1102 (1984); Coke v. General Adjustment Bureau, Inc., 640 F.2d 584, 595 (5th Cir. 1981)(en banc)

The Fifth Circuit, considering this line of cases, held:

> The import of these cases is clear: characterizing a statutory provision to be procedural rather than jurisdictional denotes an issue not of article III power, but of legislative and judicial method . . . Where a provision proves to be merely a condition precedent to bringing suit instead of a source of judicial power, the courts can, given the appropriate circumstances, equitably modify their application of the statutory terms.

Harris v. Amoco Products Co., 768 F.2d 669, 679 (5th Cir. 1985).

The Eleventh Circuit's opinion is plainly a rejection of the holdings of these cases, and raises important questions concerning several settled principles. In resolving the issues presented, a divided panel failed to

address the application of Crown, Cork, & Seal Co. v. Parker, 462 U.S. 345 (1983), and similar cases, which established tolling of the statute of limitations for putative class members. Ignoring the policy underlying the EEOC filing requirement, as well as the statutory language itself, the court held that the most narrow reading of the constitutional standing requirement for parties litigating in federal court applied to persons alleging claims before the EEOC. And, having applied that narrow view of Article III standing, the court of appeals refused to allow intervention of a putative class member under the single-filing rule.

The panel's decision below severely jeopardizes the claims of over 1400 class members who have relied for more than a decade on the lower court's determination of the class status of these proceedings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the court below reversed.

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